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107TH CONGRESS
1ST SESSION

S. 630

To prohibit senders of unsolicited commercial electronic mail from disguising the source of their messages, to give consumers the choice to cease receiving a sender's unsolicited commercial electronic mail messages, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 27, 2001

Mr. BURNS (for himself, Mr. WYDEN, Mr. LIEBERMAN, Ms. LANDRIEU, Mr. TORRICELLI, Mr. BREAUX, and Mr. MURKOWSKI) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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A BILL

To prohibit senders of unsolicited commercial electronic mail from disguising the source of their messages, to give consumers the choice to cease receiving a sender's unsolicited commercial electronic mail messages, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2001", or the "CAN SPAM Act of 2001".

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SEC. 2. CONGRESSIONAL FINDINGS AND POLICY.

(a) FINDINGS.—The Congress finds the following:

(1) There is a right of free speech on the Internet.

(2) The Internet has increasingly become a critical mode of global communication and now presents unprecedented opportunities for the development and growth of global commerce and an integrated worldwide economy. In order for global commerce on the Internet to reach its full potential, individuals and entities, using the Internet and other online services should be prevented from engaging in activities that prevent other users and Internet service providers from having a reasonably predictable, efficient, and economical online experience.

(3) Unsolicited commercial electronic mail can be a mechanism through which businesses advertise and attract customers in the online environment.

(4) The receipt of unsolicited commercial electronic mail may result in costs to recipients who cannot refuse to accept such mail and who incur costs for the storage of such mail, or for the time spent accessing, reviewing, and discarding such mail, or for both.

(5) Unsolicited commercial electronic mail may impose significant monetary costs on providers of

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Internet access services, businesses, and educational and nonprofit institutions that carry and receive such mail, as there is a finite volume of mail that such providers, businesses, and institutions can handle without further investment. The sending of such mail is increasingly and negatively affecting the quality of service provided to customers of Internet access service, and shifting costs from the sender of the advertisement to the provider of Internet access service and the recipient.

(6) While some senders of unsolicited commercial electronic mail messages provide simple and reliable way for recipients to reject (or "opt-out" of) receipt of unsolicited commercial electronic mail from such senders in the future, other senders provide no such "opt-out" mechanism, or refuse to honor the requests of recipients not to receive electronic mail from such senders in the future, or both.

(7) An increasing number of senders of unsolicited commercial electronic mail purposefully disguise the source of such mail so as to prevent recipients from responding to such mail quickly and easily.

(8) An increasing number of senders of unsolicited commercial electronic mail purposefully include misleading information in the message's subject lines

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in order to induce the recipients to view the messages.

(9) Because recipients of unsolicited commercial electronic mail are unable to avoid the receipt of such mail through reasonable means, such mail may invade the privacy of recipients.

(10) The practice of sending unsolicited commercial electronic mail is sufficiently profitable that senders of such mail will not be unduly burdened by the costs associated with providing an "opt-out" mechanism to recipients and ensuring that recipients who exercise such opt-out do not receive further messages from that sender.

(11) In legislating against certain abuses on the Internet, Congress should be very careful to avoid infringing in any way upon constitutionally protected rights, including the rights of assemble, free speech, and privacy.

(b) CONGRESSIONAL DETERMINATION OF PUBLIC POLICY.—On the basis of the findings in subsection (a), the Congress determines that—

(1) there is substantial government interest in regulation of unsolicited commercial electronic mail;

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(2) senders of unsolicited commercial electronic mail should not mislead recipients as to the source or content of such mail; and

(3) recipients of unsolicited commercial electronic mail have a right to decline to receive additional unsolicited commercial electronic mail from the same source.

SEC. 3. DEFINITIONS.

In this Act:

(1) AFFIRMATIVE CONSENT.—The term "affirmative consent", when used with respect to a commercial electronic mail message, means—

(A) the message falls within the scope of an express and unambiguous invitation or permission granted by the recipient and not subsequently revoked;

(B) the recipient had clear and conspicuous notice, at the time such invitation or permission was granted, of—

(i) the fact that the recipient was granting the invitation or permission;

(ii) the scope of the invitation or permission, including what types of commercial electronic mail messages would be covered by the invitation or permission and

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what senders or types of senders, if any, other than the party to whom the invitation or permission was communicated would be covered by the invitation or permission; and

(iii) a reasonable and effective mechanism for revoking the invitation or permission; and

(C) the recipient has not, after granting the invitation or permission, submitted a request under section 5(a)(3) not to receive unsolicited commercial electronic mail messages from the sender of the message.

(2) COMMERCIAL ELECTRONIC MAIL MESSAGE.—The term "commercial electronic mail message" means any electronic mail message the primary purpose of which is to advertise or promote, for a commercial purpose, a commercial product or service (including content on an Internet website). An electronic mail message shall not be considered to be a commercial electronic mail message solely because such message includes a reference to a commercial entity that serves to identify the sender or a reference or link to an Internet website operated for a commercial purpose.

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(3) COMMISSION.—The term "Commission" means the Federal Trade Commission.

(4) DOMAIN NAME.—The term "domain name" means any alphanumeric designation which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet.

(5) ELECTRONIC MAIL ADDRESS.—

(A) IN GENERAL.—The term "electronic mail address" means a destination (commonly expressed as a string of characters) to which electronic mail can be sent or delivered.

(B) INCLUSION.—In the case of the Internet, the term "electronic mail address" may include an electronic mail address consisting of a user name or mailbox (commonly referred to as the "local part") and a reference to an Internet domain (commonly referred to as the "domain part").

(6) FTC ACT.—The term "FTC Act" means the Federal Trade Commission Act (15 U.S.C. 41 et seq.).

(7) FUNCTIONING RETURN ELECTRONIC MAIL ADDRESS.—

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(A) The term "functioning return electronic mail address" means a legitimately obtained electronic mail address, clearly and conspicuously displayed in a commercial electronic mail message, that—

(i) remains capable of receiving messages for no less than 30 days after the transmission of such commercial electronic mail message; and

(ii) that has capacity reasonably calculated, in light of the number of recipients of the commercial electronic mail message, to enable it to receive the full expected quantity of reply messages from such recipients.

(B) An electronic mail address that meets the requirements of subparagraph (A) shall not be excluded from this definition because of a temporary inability to receive electronic mail messages due to technical problems, provided steps are taken to correct such technical problems within a reasonable time period.

(8) HEADER INFORMATION.—The term "header information" means the source, destination, and routing information attached to the beginning of an

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electronic mail message, including the originating domain name and originating electronic mail address.

(9) IMPLIED CONSENT.—The term "implied consent", when used with respect to a commercial electronic mail message, means—

(A) within the 5-year period ending upon receipt of such message, there has been a business transaction between the sender and the recipient (including a transaction involving the provision, free of charge, of information, goods, or services requested by the recipient); and

(B) the recipient was, at the time of such transaction or thereafter, provided a clear and conspicuous notice of an opportunity not to receive unsolicited commercial electronic mail messages from the sender and has not exercised such opportunity.

(10) INITIATE.—The term "initiate", when used with respect to a commercial electronic mail message, means to originate such message, to procure the origination of such message, or to assist in the origination of such message through the provision or selection of addresses to which such message will be sent, but shall not include actions that con-

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stitute routine conveyance of such message. For purposes of this Act, more than 1 person may be considered to have initiated the same message.

(11) INTERNET.—The term "Internet" has the meaning given that term in the Internet Tax Freedom Act (Public Law 105–277, div. C, title XI, § 1101(e)(3)(c)).

(12) INTERNET ACCESS SERVICE.—The term "Internet access service" has the meaning given that term in section 231(e)(4) of the Communications Act of 1934 (47 U.S.C. 231(e)(4)).

(13) PROTECTED COMPUTER.—The term "protected computer" has the meaning given that term in section 1030(e)(2) of title 18, United States Code.

(14) RECIPIENT.—The term "recipient", when used with respect to a commercial electronic mail message, means the addressee of such message. If an addressee of a commercial electronic mail message has 1 or more electronic mail addresses in addition to the address to which the message was addressed, the addressee shall be treated as a separate recipient with respect to each such address.

(15) ROUTINE CONVEYANCE.—The term "routine conveyance" means the transmission, routing,

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relaying, handling, or storing, through an automatic technical process, of an electronic mail message for which another person has provided and selected the recipient addresses.

(16) SENDER.—The term "sender", when used with respect to a commercial electronic mail message, means a person who initiates such a message and whose product, service, or Internet web site is advertised or promoted by the message, but does not include any person, including a provider of Internet access service, whose role with respect to the message is limited to routine conveyance of the message.

(17) UNSOLICITED COMMERCIAL ELECTRONIC MAIL MESSAGE.—

(A) IN GENERAL.—The term "unsolicited commercial electronic mail message" means any commercial electronic mail message that is sent to a recipient—

(i) without prior affirmative consent or implied consent from the recipient; or

(ii) to a recipient who, subsequent to the establishment of affirmative or implied consent under subparagraph (i), has expressed, in a reply submitted pursuant to section 5(a)(3), or in response to any other

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opportunity the sender may have provided to the recipient, a desire not to receive commercial electronic mail messages from the sender.

(B) EXCLUSION.—Notwithstanding subparagraph (A), the term "unsolicited commercial electronic mail message" does not include an electronic mail message sent by or on behalf of one or more lawful owners of copyright, patent, publicity, or trademark rights to an unauthorized user of protected material notifying such user that the use is unauthorized and requesting that the use be terminated or that permission for such use be obtained from the rights holder or holders.

SEC. 4. CRIMINAL PENALTY FOR UNSOLICITED COMMERCIAL ELECTRONIC MAIL CONTAINING FRAUDULENT ROUTING INFORMATION.

(a) IN GENERAL.—Chapter 63 of title 18, United States Code, is amended by adding at the end the following:

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"§ 1348. Unsolicited commercial electronic mail containing fraudulent transmission information

"(a) IN GENERAL.—Any person who intentionally initiates the transmission of any unsolicited commercial electronic mail message to a protected computer in the United States with knowledge that such message contains or is accompanied by header information that is materially or intentionally false or misleading shall be fined or imprisoned for not more than 1 year, or both, under this title.

"(b) DEFINITIONS.—Any term used in subsection (a) that is defined in section 3 of the Unsolicited Commercial Electronic Mail Act of 2001 has the meaning giving it in that section.".

(b) CONFORMING AMENDMENT.—The chapter analysis for chapter 63 of title 18, United States Code, is amended by adding at the end the following:

"1348. Unsolicited commercial electronic mail containing fraudulent routing information".

SEC. 5. OTHER PROTECTIONS AGAINST UNSOLICITED COMMERCIAL ELECTRONIC MAIL.

(a) REQUIREMENTS FOR TRANSMISSION OF MESSAGES.—

(1) PROHIBITION OF FALSE OR MISLEADING TRANSMISSION INFORMATION.—It shall be unlawful

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for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message that contains, or is accompanied by, header information that is materially or intentionally false or misleading, or not legitimately obtained.

(2) PROHIBITION OF DECEPTIVE SUBJECT HEADINGS.—It shall be unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message with a subject heading that such person knows is likely to mislead the recipient about a material fact regarding the contents or subject matter of the message.

(3) INCLUSION OF RETURN ADDRESS IN COMMERCIAL ELECTRONIC MAIL.—It shall be unlawful for any person to initiate the transmission of a commercial electronic mail message to a protected computer unless such message contains a functioning return electronic mail address to which a recipient may send a reply to the sender to indicate a desire not to receive further messages from that sender at the electronic mail address at which the message was received.

(4) PROHIBITION OF TRANSMISSION OF UNSOLICITED COMMERCIAL ELECTRONIC MAIL AFTER OBJECTION.—If a recipient makes a request to a send-

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er, through an electronic mail message sent to an electronic mail address provided by the sender pursuant to paragraph (3), not to receive further electronic mail messages from that sender, it shall be unlawful for the sender, or any person acting on behalf of the sender, to initiate the transmission of an unsolicited commercial electronic mail message to such a recipient within the United States more than 10 days after receipt of such request.

(5) INCLUSION OF IDENTIFIER, OPT-OUT, AND PHYSICAL ADDRESS IN UNSOLICITED COMMERCIAL ELECTRONIC MAIL.—It shall be unlawful for any person to initiate the transmission of any unsolicited commercial electronic mail message to a protected computer unless the message provides, in a manner that is clear and conspicuous to the recipient—

(A) identification that the message is an advertisement or solicitation;

(B) notice of the opportunity under paragraph (3) to decline to receive further unsolicited commercial electronic mail messages from the sender; and

(C) a valid physical postal address of the sender.

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(b) NO EFFECT ON POLICIES OF PROVIDERS OF INTERNET ACCESS SERVICE.—Nothing in this Act shall be construed to have any effect on the lawfulness or unlawfulness, under any other provision of law, of the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages.

SEC. 6. ENFORCEMENT.

(a) ENFORCEMENT BY COMMISSION.—

(1) IN GENERAL.—Section 5 of this Act shall be enforced by the Commission under the FTC Act. For purposes of such Commission enforcement, a violation of section 5 of this Act shall be treated as a violation of a rule under section 18 (15 U.S.C. 57a) of the FTC Act regarding unfair or deceptive acts or practices.

(2) SCOPE OF COMMISSION ENFORCEMENT AUTHORITY.—

(A) The Commission shall prevent any person from violating section 5 of this Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the FTC Act were incorporated into and made a part of

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this section. Any person who violates section 5 of this Act shall be subject to the penalties and entitled the privileges and immunities provided in the FTC Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the FTC Act were incorporated into and made a part of this section.

(B) Nothing in this Act shall be construed to give the Commission authority over activities that are otherwise outside the jurisdiction of the FTC Act.

(b) ENFORCEMENT BY CERTAIN OTHER AGENCIES.—

(1) IN GENERAL.—Compliance with section 5 of this Act shall be enforced under—

(A) section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), in the case of—

(i) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(ii) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks

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(other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601 et seq. and 611 et seq.), by the Federal Reserve Board; and

(iii) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;

(B) section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation;

(C) the Federal Credit Union Act (12 U.S.C. 1751 et seq.) by the National Credit Union Administration Board with respect to any Federal credit union;

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(D) part A of subtitle VII of title 49, United States Code, by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that part;

(E) the Packers and Stockyards Act, 1921 (7 U.S.C. 181 et seq.) (except as provided in section 406 of that Act (7 U.S.C. 226, 227)), by the Secretary of Agriculture with respect to any activities subject to that Act;

(F) the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.) by the Farm Credit Administration with respect to any Federal land bank, Federal land bank association, Federal intermediate credit bank, or production credit association; and

(G) the Communications Act of 1934 (47 U.S.C. 151 et seq.) by the Federal Communications Commission with respect to any person subject to the provisions of that Act.

(2) EXERCISE OF CERTAIN POWERS.—For the purpose of the exercise by any agency referred to in paragraph (1) of its powers under any Act referred to in that paragraph, a violation of section 5 of this Act is deemed to be a violation of a requirement imposed under that Act. In addition to its powers

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under any provision of law specifically referred to in paragraph (1), each of the agencies referred to in that paragraph may exercise, for the purpose of enforcing compliance with any requirement imposed under section 5 of this Act, any other authority conferred on it by law.

(c) ENFORCEMENT BY STATES.—

(1) CIVIL ACTION.—In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person engaging in a practice that violates section 5 of this Act, the State, as parens patriae, may bring a civil action on behalf of the residents of the State in a district court of the United States of appropriate jurisdiction or in any other court of competent jurisdiction—

(A) to enjoin that practice, or

(B) to obtain damages on behalf of residents of the State, in an amount equal to the greater of—

(i) the actual monetary loss suffered by such residents; or

(ii) the amount determined under paragraph (2).

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(2) STATUTORY DAMAGES.—For purposes of paragraph (1)(B)(ii), the amount determined under this paragraph is the smaller of—

(A) the amount determined by multiplying the number of willful, knowing, or negligent violations by an amount, in the discretion of the court, of up to $10 (with each separately addressed unlawful message received by such residents treated as a separate violation); or

(B) $500,000.

In determining the per-violation penalty under this paragraph, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(3) TREBLE DAMAGES.—If the court finds that the defendant committed the violation willfully and knowingly, the court may increase the amount recoverable under paragraph (2) up to threefold.

(4) ATTORNEY FEES.—In the case of any successful action under subparagraph (1), the State shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

(5) NOTICE.—

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(A) PRE-FILING.—Before filing an action under paragraph (1), an attorney general shall provide to the Commission—

(i) written notice of that action; and

(ii) a copy of the complaint for that action.

(B) CONTEMPORANEOUS.—If an attorney general determines that it is not feasible to provide the notice required by subparagraph (A) before filing the action, the notice and a copy of the complaint shall be provided to the Commission when the action is filed.

(6) INTERVENTION.—If the Commission receives notice under paragraph (4), it—

(A) may intervene in the action that is the subject of the notice; and

(B) shall have the right—

(i) to be heard with respect to any matter that arises in that action; and

(ii) to file a petition for appeal.

(7) CONSTRUCTION.—For purposes of bringing any civil action under paragraph (1), nothing in this Act shall be construed to prevent an attorney general of a State from exercising the powers conferred

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on the attorney general by the laws of that State to—

(A) conduct investigations;

(B) administer oaths or affirmations; or

(C) compel the attendance of witnesses or the production of documentary and other evidence.

(8) VENUE; SERVICE OF PROCESS.—

(A) VENUE.—Any action brought under paragraph (1) may be brought in the district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28, United States Code.

(B) SERVICE OF PROCESS.—In an action brought under paragraph (1), process may be served in any district in which the defendant—

(i) is an inhabitant; or

(ii) maintains a physical place of business.

(9) LIMITATION ON STATE ACTION WHILE FEDERAL ACTION IS PENDING.—If the Commission or other appropriate Federal agency under subsection (b) has instituted a civil action or an administrative action for violation of this Act, no State attorney general may bring an action under this subsection

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during the pendency of that action against any defendant named in the complaint of the Commission or the other agency for any violation of this Act alleged in the complaint.

(d) ACTION BY PROVIDER OF INTERNET ACCESS SERVICE.—

(1) ACTION AUTHORIZED.—A provider of Internet access service adversely affected by a violation of section 5 may bring a civil action in any district court of the United States with jurisdiction over the defendant, or in any other court of competent jurisdiction, to—

(A) enjoin further violation by the defendant; or

(B) recover damages in any amount equal to the greater of—

(i) actual monetary loss incurred by the provider of Internet access service as a result of such violation; or

(ii) the amount determined under paragraph (2).

(2) STATUTORY DAMAGES.—For purposes of paragraph (1)(B)(ii), the amount determined under this paragraph is the smaller of—

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(A) the amount determined by multiplying the number of willful, knowing, or negligent violations by an amount, in the discretion of the court, of up to $10 (with each separately addressed unlawful message carried over the facilities of the provider of Internet access service treated as a separate violation); or

(B) $500,000.

In determining the per-violation penalty under this paragraph, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(3) TREBLE DAMAGES.—If the court finds that the defendant committed the violation willfully and knowingly, the court may increase the amount recoverable under paragraph (2) up to threefold.

(4) ATTORNEY FEES.—In any action brought pursuant to paragraph (1), the court may, in its discretion, require an undertaking for the payment of the costs of such action, and assess reasonable costs, including reasonable attorneys' fees, against any party.

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(5) EVIDENTIARY PRESUMPTION.—For purposes of an action alleging a violation of section 5(a)(4) or 5(a)(5), a showing that a recipient has submitted a complaint about a commercial electronic mail message to an electronic mail address maintained and publicized by the provider of Internet access service for the purpose of receiving complaints about unsolicited commercial electronic mail messages shall create a rebuttable presumption that the message in question was unsolicited within the meaning of this Act.

(e) AFFIRMATIVE DEFENSE.—A person shall not be liable for damages under subsection (c)(2) or (d)(2) if—

(1) such person has established and implemented, with due care, reasonable practices and procedures to effectively prevent violations of section 5; and

(2) any violation occurred despite good faith efforts to maintain compliance with such practices and procedures.

SEC. 7. EFFECT ON OTHER LAWS.

(a) FEDERAL LAW.—Nothing in this Act shall be construed to impair the enforcement of section 223 or 231 of the Communications Act of 1934, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of chil-

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dren) of title 18, United States Code, or any other Federal criminal statute.

(b) STATE LAW.—No State or local government may impose any civil liability for commercial activities or actions in interstate or foreign commerce in connection with an activity or action described in section 5 of this Act that is inconsistent with or more restrictive than the treatment of such activities or actions under this Act, except that this Act shall not preempt any civil action under—

(1) State trespass, contract, or tort law; or

(2) any provision of Federal, State, or local criminal law or any civil remedy available under such law that relates to acts of computer fraud perpetrated by means of the unauthorized transmission of unsolicited commercial electronic mail messages, provided that the mere sending of unsolicited commercial electronic mail in a manner that complies with this Act shall not constitute an act of computer fraud for purposes of this subparagraph.

SEC. 8. STUDY OF EFFECTS OF UNSOLICITED COMMERCIAL ELECTRONIC MAIL.

Not later than 18 months after the date of the enactment of this Act, the Commission, in consultation with the Department of Justice and other appropriate agencies, shall submit a report to the Congress that provides a de-

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tailed analysis of the effectiveness and enforcement of the provisions of this Act and the need (if any) for the Congress to modify such provisions.

SEC. 9. SEPARABILITY.

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected.

SEC. 10. EFFECTIVE DATE.

The provisions of this Act shall take effect 120 days after the date of the enactment of this Act.

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